

**Summary of SC92291, Whelan Security Co. v. Charles Kennebrew Sr. and W. Landon Morgan**

Appeal from the St. Louis County circuit court, Judge Maura B. McShane  
Argued and submitted May 23, 2012 opinion issued Aug. 14, 2012

**Attorneys:** Whelan was represented by Mark W. Weisman and Bradley G. Kafka of Polsinelli Shughart PC in St. Louis, (314) 622-6628; Kennebrew was represented by Jonathan Sternberg, a solo attorney in Kansas City, (816) 474-3000, and Crystal Moody of The Moody Law Firm in Houston, Texas, (832) 423-0873; and Morgan was represented by William A. Wooten of the Law Office of J. Houston Gordon in Covington, Tennessee, (901) 476-7100.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A security company appeals the grant of summary judgment in favor of two of its former employees whom it sued for violating certain clauses of their employment contracts. In a 6-0 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case. The provisions of the customer non-solicitation clauses prohibiting the employees from soliciting any of the company's customers – existing or prospective – throughout the nation from the last 12 months of their employment are unreasonably broad under the circumstances. This clause is modified to eliminate the provision prohibiting the employees from soliciting existing customers except those with whom they dealt during their employment as well as to eliminate the prohibition against the employees soliciting prospective customers. The trial court erred in granting summary judgment as to the employee non-solicitation clauses. The one-year prohibition in one employee's contract is per se reasonable and enforceable under the applicable statute. The two-year prohibition in the other employee's contract is silent as to its purpose, and because this ambiguity leaves a genuine issue of fact to be determined, summary judgment was improper as to this issue. The trial court also erred in granting summary judgment as to the non-competition clause in one of the contracts. Although the clause is enforceable, there is a genuine issue of material fact as to where the employee provided services for his former company and, therefore, whether his later actions violated the employment contract.

Judge Jon E. Beetem, a circuit judge in the 19th circuit (Cole County), sat in this case by special designation in place of Judge George W. Draper III.

**Facts:** Whelan Security Co. provides security guard services nationwide. Based in Missouri, it has 38 branches in 23 states. In December 2006, Whelan executed an agreement to employ Landon Morgan as manager of its Nashville, Tennessee, branch. As branch manager, Morgan was responsible for operations, sales and marketing, which gave him access to the company's client records and employee files and required him to meet with clients. In November 2007, Whelan executed an agreement to employ Charles Kennebrew Sr. to be director of quality assurance for its Dallas, Texas, office. As quality assurance director, Kennebrew had access to the company's employee and financial records and was in contact with the company's customers in various parts of Texas. The parties dispute whether Kennebrew provided services for Whelan

in Houston, Texas. Both men's employment contracts contained non-competition and employee non-solicitation clauses. These clauses were similar, except Morgan's employee non-solicitation clause had a one-year prohibition, while Kennebrew's had a two-year prohibition. Morgan resigned from Whelan in December 2008, and Kennebrew resigned in March 2009 but continued working for Whelan, at its request, until August 2009. Whelan was aware Kennebrew intended to start his own security company – Elite Protective Services LLC – but did not believe that Elite would be in direct competition with its services. Morgan joined Elite shortly after it was started. In late 2009, Kennebrew solicited the business of Park Square Condominiums, a Whelan client in Houston. In December 2009, Kennebrew signed a contract on Elite's behalf to provide Park Square with security services, and the next day, Morgan gave Elite employment packets to Whelan's employees at Park Square. Park Square terminated its relationship with Whelan in January 2010, and Elite retained several of Whelan's employees at Park Square. Whelan sued Kennebrew and Morgan, seeking to enjoin them from violating the terms of their employment contracts as well as seeking damages for breach of contract, unjust enrichment and civil conspiracy. Ultimately, the trial court granted summary judgment in favor of Kennebrew and Morgan. Whelan appeals.

## **REVERSED AND REMANDED.**

**Court en banc holds:** (1) In balancing the competing interests of employers to engage a highly trained workforce without the risk of losing customers or business secrets after an employee leaves with those of employees to have mobility between employers to provide for their families and advance their careers, Missouri courts generally enforce a non-compete agreement if it is demonstratively reasonable. An agreement is reasonable if it is no more restrictive than necessary to protect the employer's legitimate interests. Such an agreement is enforceable only to the extent the restrictions protect an employer's trade secrets or customer contacts. The employer has the burden to prove the non-compete agreement protects its legitimate interests in trade secrets or customer contacts and that the agreement is reasonable as to time and geography.

(2) The provisions of the customer non-solicitation clauses prohibiting Kennebrew and Morgan from soliciting any Whelan customer – existing or prospective – throughout the nation from the last 12 months of their employment are unreasonably broad under the circumstances. Although restrictive covenants generally must be tailored narrowly in both temporal and geographic scope, courts have enforced customer non-solicitation clauses without geographic limitation when other limitations to the prohibited conduct exist or when the employee had significant contact with a substantial number of the employer's customers. Here, however, there is no additional limiting language or circumstance that otherwise limits the scope of the restriction. The clauses here prohibit contact with any Whelan customer regardless of whether Kennebrew and Morgan knew it was Whelan's customer or previously dealt with that customer. Further, although Kennebrew and Morgan had significant client contact in Nashville and Dallas – the areas to which they were assigned – and possibly in Houston, there is nothing showing they had significant contact with a substantial number of Whelan's customers in other parts of the nation so as to warrant a national prohibition. Further, the clauses also prohibit Kennebrew and Morgan from soliciting prospective clients that Whelan sought during the last 12 months of their employment – who potentially could include any business that might benefit from increased security, regardless of how tenuous the relationship is between the business and Whelan or how detached Kennebrew

and Morgan were from Whelan's solicitation. As such, the clause reaches beyond that necessary to protect Whelan's legitimate interest in customer contacts but instead protects Whelan from competition altogether by Kennebrew and Morgan. Although the provisions of a non-compete clause may impose restraints that are unreasonably broad, appellate courts still can give effect to their purpose by refusing to give effect to the unreasonable terms or modifying the terms to be reasonable. As such, the customer non-solicitation clause is modified to eliminate the provision prohibiting Kennebrew and Morgan from soliciting existing Whelan customers except those with whom they dealt during their employment. The customer non-solicitation clause also is modified to eliminate the prohibition against Kennebrew and Morgan soliciting Whelan's prospective customers. These clauses are enforceable as modified.

(3) The trial court erred in granting summary judgment as to the employee non-solicitation clauses, both of which are enforceable. These clauses prohibit solicitation of any of Whelan's employees or agents by Kennebrew for two years and by Morgan for one year. Under the plain language of section 431.202.2, RSMo, an employee non-solicitation covenant conclusively is presumed reasonable when its duration is for a year or less or when its purpose is to protect the employer's interests identified under section 431.202(3), including confidential or trade secret information; relationships with customers or suppliers; the company's goodwill; and company loyalty. Under the statute, a covenant that exceeds one year or that does not protect one of the identified interests still may be reasonable based on the facts and circumstances of the case. Under section 431.202, Morgan's one-year prohibition is per se reasonable and enforceable. The court erred in ruling otherwise. As to Kennebrew's two-year prohibition, it is silent as to its purpose under section 431.202(3). As such, the contract is ambiguous, and the intent of the parties is a factual issue yet to be resolved. Because there is a genuine issue of fact to be determined as to the purpose of the employee non-solicitation clause in Kennebrew's contract, summary judgment was improper as to this issue.

(4) The trial court erred in granting summary judgment as to the non-competition clause in Kennebrew's contract. This clause prohibits him, for a period of two years, from working for a competing business within 50 miles of any location where he provided or arranged for Whelan to provide services. This clause is enforceable against Kennebrew, as considerable precedent in Missouri supports the reasonableness of a two-year non-compete agreement for an operations limited to 50 miles from where the employee rendered services. There is a genuine factual issue, however, as to whether Kennebrew's actions violated this covenant, as the parties dispute whether Kennebrew provided services in Houston while employed with Whelan's Dallas office.